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Start dba Rainbow Canyon Retreat ("Fresh Start")*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

DAVID WELCH, a Texas Citizen;
STACY WELCH, a Texas Citizen; and
JACK WELCH, a Texas Citizen,

Plaintiffs,

vs.

NARCONON FRESH START d/b/a
RAINBOW CANYON RETREAT, a
California Corporation;
ASSOCIATION FOR BETTER
LIVING AND EDUCATION
INTERNATIONAL; NARCONON
INTERNATIONAL and DOES 1-100,
ROE Corporations I-X, inclusive,

Defendants.

CASE NO. 2:14-cv-00167-JCM-CWH

**[REDACTED] DEFENDANT
NARCONON FRESH START DBA
RAINBOW CANYON RETREAT'S
MOTION TO COMPEL FURTHER
DEPOSITION OF PLAINTIFF
JACK WELCH**

ORAL ARGUMENT REQUESTED

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure
3 30 and 37, Defendant Narconon Fresh Start (“Fresh Start”) hereby moves the Court
4 for an Order compelling Plaintiff Jack Welch to appear for a second day of
5 deposition. This motion is based on the accompanying Memorandum of Points and
6 Authorities, the Declaration of William H. Forman and the exhibits thereto, and all
7 records that the Court may consider.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. INTRODUCTION**

10 Plaintiff Jack Welch (“Welch” or “Jack”) instituted this lawsuit about his drug
11 addiction and then refused to answer entire categories of questions about his drug
12 addiction at his deposition. Specifically, [REDACTED]

13 [REDACTED]
14 [REDACTED] Then, the day *after* his
15 deposition, Welch’s lawyers for the first time produced hundreds of pages of his
16 medical records, that are highly pertinent to the alleged injuries for which Welch
17 seeks damages. These twin abuses have frustrated appropriate discovery, and
18 warrant a second day of Welch’s deposition.

19 Welch’s deposition should be reopened. He should be required to answer all
20 relevant questions [REDACTED], and Fresh Start should have the
21 opportunity to ask him about the previously-concealed medical records.

22 **II. FACTUAL ALLEGATIONS AND DISCOVERY POSTURE**

23 **A. Factual Allegations**

24 In August 2013, Plaintiffs Stacy and David Welch were looking for a drug
25 rehabilitation program in which to enroll their son, Jack.¹ (Docket No. 23, Second
26 _____)

27 ¹ At the time, Jack Welch was already enrolled in a different drug treatment
28 program called The Right Step, which has not been named as a party to this action.

1 Amended Complaint (“SAC”) at ¶ 13.) Soon thereafter, Jack enrolled in Fresh
2 Start’s treatment program. (*Id.* at ¶ 21.) He left the Fresh Start facility in November
3 2013, and the Welches jointly filed this action in January 2014.² (*Id.* at ¶¶ 53-54.)

4 Plaintiffs allege, among other things, that Fresh Start did not provide adequate
5 drug treatment. (*Id.* at ¶¶ 62-63.) They also allege that Fresh Start’s rehabilitation
6 program caused Jack to suffer tremors, and that the aftereffects of the program
7 impaired his social life. (*Id.* at ¶ 47.)

8 **B. Initial Discovery and Depositions**

9 The parties exchanged initial Rule 26 disclosures in April 2014. (Declaration
10 of William H. Forman at ¶ 2.) Fresh Start propounded initial discovery requests,
11 including document requests, shortly thereafter. All three Plaintiffs replied to Fresh
12 Start’s initial Interrogatories and Requests for Production of Documents on July 7,
13 2014. (*Id.* at ¶ 3.) A series of requests and productions ensued, until Fresh Start
14 deposed Plaintiffs Stacy and David Welch on January 6 and 7, 2015, respectively.
15 (*Id.* at Ex. B, Stacy Welch Deposition Transcript at 1:19; *and* Ex. B, David Welch
16 Deposition Transcript at 1:19.)

17 The depositions addressed both their understanding of Fresh Start’s treatment
18 program, and the claims that their son had been injured by the program. (Stacy
19 Welch Tr. at 57:22-58:2; David Welch Tr. at 54:16-55:17.) [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 _____
26 ² [REDACTED]
27 [REDACTED]
28 [REDACTED]

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Additionally, because Plaintiffs are seeking damages for physical injury, Fresh Start sought information concerning Jack Welch's history of medical care. (*E.g.*, Stacy Welch Tr. at 51:14-18.) Plaintiffs did not object to this line of inquiry, answering each question posed. (*Id.* at 51:23-53:14.)

C. Jack Welch Refuses to Answer Deposition Questions

Jack Welch's deposition was held the following week, on February 12, 2015. (Forman Decl. at Ex. A, Jack Welch Deposition Transcript at 1:18.) Welch was asked about [REDACTED] and his claimed injuries. However, after consultation with counsel, Jack refused to answer a number of questions designed to discover [REDACTED] Specifically, Jack refused to answer *any* questions concerning [REDACTED]

Mr. Ham: Could we take a quick break, Counsel?
Mr. Forman: Well, there's a question --
Mr. Ham: I understand there's a question pending, but I'm going to let him answer it, so. . . I'm going to instruct him not to answer it. Can we take a break and I may let him answer it after the break.
I'd like to talk to Mr. Welch and my cocounsel.

(*Id.*) After returning from a brief recess, Jack's counsel stated that "[Mr. Welch] is not comfortable talking about [REDACTED] He

1 further explained:

2 I can understand why, from a constitutional point of
3 view, and so he's not going to be answering questions
4 [REDACTED]. I don't see the relevance [REDACTED]
5 [REDACTED] either, so I'm not in a position to disagree with Mr.
6 Welch in his decision.

7 We can agree to disagree. We can deal with the
8 magistrate and, you know, come back if you guys want
9 to, but as far as we're concerned, as we sit here today,
10 he's happy to tell you all about [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 Relying on this reasoning, Jack refused to answer a series of questions³
15 relating to [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED] Essentially, Welch has taken the position
19 that Fresh Start must take him at his word [REDACTED]
20 [REDACTED] This position is particularly troublesome given
21 Welch's evasiveness on the subject.⁴

22
23
24 ³ A complete list of at-issue questions is included in Appendix A hereto.
⁴

D. Plaintiffs’ Post-Deposition Production of Pre-Deposition Documents

The day after Jack Welch’s stonewalling, Plaintiffs “supplemented” their initial Rule 26 disclosures with dozens of medical records, spanning hundreds of pages. (Forman Decl. at Ex. D, February 13 Supplement at 16-18.⁵) But Fresh Start had specifically asked for all such medical records in its initial Request for Production of Documents over seven months earlier. The initial Request for Production sought, among other things:

- “[a]ny and all documents constituting, relating or referring to the nature, extent, and/or amount of medical expenses or damages allegedly incurred . . . as a result of the incident alleged in your Complaint”;
- “[a]ny and all x-rays, CT scans, films, MRIs, myelograms, fluoroscopies, or other medical photographs in your possession, custody and/or control that may be involved in the alleged negligence delineated in your complaint”;
- “[a]ny and all correspondence between [Mr. Welch] and any treating, consulting, or practicing physician. This request includes . . . requests for copies of medical records, responses to such requests, prescriptions, letters for appointments, letters for follow-up treatment, letters of referral, letters for consultation, letters for hospitalization, letters of billing, letters of collection, or personal correspondence

(Forman Decl. at Ex. E, Response to Request for Production of Documents Nos. 9, 12, 16.) Jack responded to these Requests on July 7, 2014, stating that he would “produce responsive documents.” (*Id.* at Nos. 9, 12.) Indeed, he explicitly stated

⁵ Plaintiffs’ counsel noted all amendments and additions to the disclosures by formatting them in bold face text.

1 that he would “produce medical and billing records for Jack Welch.” (*Id.* at No.
2 16.)

3 The late disclosure also identified fifteen medical providers who had treated
4 Jack Welch during the relevant time period: (1) Dr. Sam Lingamfelter, at Clear
5 Lake Family Physicians; (2) Clear Lake Regional Hospital; (3) Dr. Robert N. Earle;
6 (4) The Right Step; (5) Institute for Progressive Medicine, Internal Medicine &
7 Wellness; (6) Dr. Sam Lingamfelter, at Snow Canyon Clinic; (7) North Star
8 Imaging; (8) LabCorp; (9) Meadow Valley Pharmacy; (10) Lincoln County Medical
9 Associates; (11) Gulf Coast MRI & Diagnostic; (12) River Oak Diagnostics; (13)
10 Lakeside MRI & Diagnostic Center; (14) Dominion Diagnostics; and (15) Quest
11 Diagnostics. (February 13 Disclosure Supplement at 3-5.)⁶

12 As with the document production, the identity of each of these providers was
13 responsive to Fresh Start’s earlier discovery requests. In its First Set of
14 Interrogatories, Fresh Start asked Mr. Welch to “[s]tate the name and address of
15 each medical practitioner who examined or treated [him] for any physical, mental,
16 emotional, psychiatric or psychological condition during the five-year period
17 immediately before the date of the incident complained of, and since the incident. . .
18 .” (Forman Decl. at Ex. F, Supplemental Response to Interrogatory No. 8.) Even in
19 his supplemental response, provided more than five months after the request was
20 posed, Mr. Welch simply responded “Plaintiffs produce Jack Welch’s medical bills
21 and records.” (*Id.*)

22
23 ⁶ While Fresh Start had previously obtained information concerning seven of
24 these providers, the remainder were entirely new. Fresh Start had previously
25 obtained information concerning: (3) Dr. Robert N. Earle, (4) The Right Step, (5)
Institute for Progressive Medicine, Internal Medicine & Wellness, (6) Dr. Sam
Lingamfelter, at Snow Canyon Clinic, (7) North Star Imaging, (9) Meadow Valley
Pharmacy, and (10) Lincoln County Medical Associates.

26 In addition, one of the providers, Dr. Sam Lingamfelter, was identified twice
27 by Plaintiffs: first in affiliation with Clear Lake Family Physicians, and second in
28 affiliation with Snow Canyon Clinic. While Fresh Start had previously obtained
information identifying Snow Canyon Clinic, it was unaware of Clear Lake Family
Physicians before the untimely production.

1 In total, Plaintiffs' document dump included 18 separate sets of medical
2 records, 16 sets of billing records, and the results of 2 MRIs, 1 EEG, and 1 CT scan.
3 (February 13 Disclosure at 16-18.) The medical and billing records alone totaled
4 796 pages, and 441 of those pages—along with both MRIs—came from previously
5 undisclosed medical providers. (*Id.*)

6 Plaintiffs knew about these medical providers and records long before they
7 were disclosed. Jack Welch was actively visiting several providers throughout
8 2014. For instance, one of the unrevealed MRIs was taken on January 15, 2014,
9 (Forman Decl. at Ex. G at 1, JWELCH-GULFCOAST-MEDICAL-000001), while
10 Quest Diagnostics provided records from as late as December 4, 2014. (*Id.* at 4,
11 JWELCH-QUEST-MEDICAL-000005.) Moreover, it appears that Plaintiffs'
12 counsel was in possession of many of the records up to several months before Jack
13 Welch's deposition was taken. For instance:

- 14 1. Time-and-date information, apparently added by a printer, from Gulf
15 Coast MRI & Diagnostics indicates that its medical and billing records
16 were provided to Plaintiffs on October 14, 2014. (*Id.* at 1, JWELCH-
17 GULFCOAST-MEDICAL-000001.)
- 18 2. The custodian of records affidavit from Lakeside MRI & Diagnostic
19 Center indicates its medical and billing records were provided to
20 Plaintiffs on January 9, 2015. (*Id.* at 8, JWELCH-LAKESIDE-
21 MEDICAL-000001.)
- 22 3. The custodian of records affidavit from Quest Diagnostic indicates that
23 its medical and billing records were provided to Plaintiffs on either
24 January 16 or January 23, 2015. (*Id.* at 2, JWELCH-QUEST-
25 MEDICAL-000001; *Id.* at 5, JWELCH-QUEST-BILLING-000001.)
- 26 4. The custodian of records affidavit from Clear Lake Family Physicians
27 indicates that its medical and billing records were provided to
28 Plaintiffs' attorney on January 21, 2015. (*Id.* at 6, JWELCH-

1 CLEARLAKE-MEDICAL-000002.)

2 5. The custodian of records affidavit from Dr. M. Christina Ivan, who has
3 still not been formally disclosed, indicates that her medical and billing
4 records were provided to Plaintiffs on January 29, 2015. (*Id.* at 12,
5 JWELCH-IVAN-MEDICAL-000009.)

6 6. The custodian of records affidavit from LabCorp indicates that its
7 medical and billing records were provided to Plaintiffs' attorney on
8 February 3, 2015. (*Id.* at 9, 11, JWELCH-LABCORP-MEDICAL-
9 000001, 000003.)

10 7. An invoice from the Clear Lake Regional Medical Center to Plaintiffs'
11 attorney indicates that its medical and billing records were provided no
12 later than February 6, 2015. (*Id.* at 14, JWELCH-CLREGIONAL-
13 MEDICAL-000001).

14 8. Time-and-date transmittal information, apparently added by a fax
15 machine, from the Dominion Diagnostics records indicates that its
16 medical and billing records were provided to Plaintiffs' attorney on
17 February 10, 2015, at 11:36 AM. (*Id.* at 13, JWELCH-DOMINION-
18 MEDICAL-000001.)

19 Among other things, these new records include an MRI taken less than two months
20 after Jack Welch left Fresh Start's program. This MRI reveals no injuries. (*Id.* at 1,
21 JWELCH-GULFCOAST-MEDICAL-000001.) The new records also reveal that
22 Jack Welch suffered neck spasms in February 2011, several years before he enrolled
23 in Fresh Start's treatment program. (*Id.* at 7, JWELCH-CLEARLAKE-MEDICAL-
24 000079.) Because none of these documents were provided until after all Plaintiffs
25 had been deposed, Fresh Start was unable to question any Plaintiffs about their
26 contents, or what they might mean for Plaintiffs' physical injury claims.

27 **E. Compliance with Notification Requirements**

28 Fresh Start's attorneys have met and conferred with Jack Welch's lawyers

multiple times since his deposition. On April 27, 2015, Artemus W. Ham and Ryan Hamilton were sent a letter explaining Fresh Start's need for a second day of deposition. (Forman Decl. at Ex H.) Mr. Ham spoke with William Forman, Fresh Start's attorney, about the possibility that Jack might appear for a reopened deposition. (*Id.* at ¶ 8.) And on May 4, 2015, Mr. Ham ruled out that same possibility. (*Id.* at Ex. I.)

III. ARGUMENT

A. Legal Standard

In the absence of a stipulation, a party must obtain leave from the court to reopen a deposition. Fed. R. Civ. P. 30(a)(2)(A) (ii). "A party seeking discovery may move for an order compelling an answer" if "a deponent fails to answer a question asked under Rule 30 or 31." Fed. R. Civ. P. 37(a)(3)(B)(i). Likewise, the late production of documents after deposition may "entitle[]" a party, "if it wishes, to reopen [that] deposition." *JS Products, Inc. v. Kabo Tool Co.*, No. 2:11-CV-01856-RCJ, 2014 WL 2919184, at *4 (D. Nev. June 26, 2014).

Whether to reopen a deposition lies within the court's discretion. *Couch v. Wan*, 2012 WL 4433470, at *3 (E.D.Cal. Sept.24, 2012) (*citing Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 690 (D.Kan.1996)). "The Committee Notes to the 2000 Amendments to Rule 30 explain that the party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order." *Syncora Guarantee Inc. v. EMC Mortgage Corp.*, No. MC 13-80037 SI, 2013 WL 1208936, at *1 (N.D. Cal. Mar. 25, 2013) (internal quotations omitted).

B. There Is Good Cause to Reopen Jack Welch's Deposition

1. Jack Welch Improperly Refused to Answer Questions During His Deposition

Plaintiff Jack Welch improperly refused to answer a number of questions during his deposition. The Court should therefore order the deposition reopened and

1 compel him to answer those questions. *See Brincko v. Rio Properties, Inc.*, 278
 2 F.R.D. 576, 581 (D. Nev. 2011) (“Rule 37(a)(3)(C) permits a party asking questions
 3 for which answers are not provided during a deposition to . . . complete the
 4 deposition . . . before moving for an order compelling disclosure.”)

5 The Federal Rules are specific as to when counsel may instruct a deponent not
 6 to answer a question. Rule 30 provides, in pertinent part: “A person may instruct a
 7 deponent not to answer only when necessary to preserve a privilege, to enforce a
 8 limitation ordered by the court, or to present a motion under Rule 30(d)(3).” Fed. R.
 9 Civ. P. 30(c)(2); *see Brincko v. Rio Properties, Inc.*, 278 F.R.D. 576, 580-81 (D.
 10 Nev. 2011) (“Counsel may instruct a witness not to answer a deposition question
 11 only under three circumstances: (1) ‘when necessary to preserve a privilege;’ (2) ‘to
 12 enforce a limitation on evidence directed by the court;’ or (3) to protect a witness
 13 from an examination ‘being conducted in bad faith or in such a manner as
 14 unreasonably may annoy, embarrass, or oppress the deponent or party.’”) (*quoting*
 15 Fed. R. Civ. P. 30(c)(2) & (d)(3)(A)). “Simply put, there are very few
 16 circumstances in which an instruction not to answer a deposition question is
 17 appropriate.” *Brincko*, 278 F.R.D. at 581. None of those circumstances is present in
 18 this case.⁷

19 Jack Welch was asked questions about [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

23 _____
 24 ⁷ Likely aware of these limitations, Plaintiffs’ counsel was very careful in
 25 how he attempted to justify Jack’s refusal to answer questions: initially, he stated
 26 that he instructed Jack not to answer (Jack Welch Tr. 32:18-19), but then he
 27 backtracked and merely noted that he was “not in a position to disagree” with Jack’s
 28 refusal to answer. (*Id.* 33:12-13.) To the extent counsel’s comments are construed
 as an instruction not to answer, the instruction was clearly improper. And regardless
 of how counsel’s comments are construed, there was no legal basis for Jack’s refusal
 to answer the questions.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 Plaintiffs' counsel, Artemus W. Ham, offered two justifications for Jack's
11 refusal to answer these questions. First, he believed that, "from a constitutional
12 point of view," [REDACTED] were objectionable. [REDACTED]
13 He later clarified that this objection was "based on the discussion" he had with his
14 client "about the Fifth Amendment." (*Id.* at 130:9-11.) But Jack Welch did not
15 invoke the Fifth Amendment [REDACTED]

16 [REDACTED] And Jack Welch [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 Accordingly, any Fifth Amendment objection should be dismissed out of hand.

22 Second, Mr. Ham said that he did not "see the relevance [REDACTED]
23 [REDACTED] But "relevance" is a broad concept under the Federal
24 Rules. Pursuant to Rule 26, a party is entitled to any discovery "regarding any
25 nonprivileged matter that is relevant to any party's claim or defense," including any
26 [REDACTED]

27 ⁸ Moreover, there is a protective order in this case [REDACTED]
28 [REDACTED]

1 discovery that “appears reasonably calculated to lead to the discovery of admissible
2 evidence.” Fed.R.Civ.P. 26(b)(1). “The Federal Rules of Civil Procedure creates a
3 ‘broad right of discovery’ because ‘wide access to relevant facts serves the integrity
4 and fairness of the judicial process by promoting the search for the truth.’” *Epstein*
5 *v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir.1995) (*quoting Shoen v. Shoen*, 5 F.3d
6 1289, 1292 (9th Cir.1993)); *see also* [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 As Defense counsel suggested during Jack’s deposition, [REDACTED]
12 [REDACTED] implicates the effectiveness of Fresh Start’s drug
13 rehabilitation program. [REDACTED]
14 [REDACTED] Since Plaintiffs have alleged
15 damages based on the ineffectiveness of Fresh Start’s program, this is a critical area
16 of inquiry. The [REDACTED] is,
17 therefore, relevant.

18 Similarly, information pertaining to [REDACTED] before (and after)
19 his interaction with Fresh Start could explain any injuries he may currently be
20 suffering that he blames on Fresh Start. These injuries purportedly include memory
21 loss, depression, cognitive deficits, and tremors. (Forman Decl. at Ex. F,
22 Supplemental Response to Interrogatory No. 7.) [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] At
26 the least, it might reasonably “lead to the discovery of admissible evidence.” Fed.
27 R. Civ. P. 26(b)(1). In fact, Jack himself implicitly admitted that this area of inquiry
28 was relevant by describing [REDACTED]

1 [REDACTED] Fresh Start only wishes to know [REDACTED]

2 [REDACTED]

3 2. Plaintiffs' Delayed Document Production Also Requires Reopening of
4 the Deposition

5 Additionally, Plaintiffs sandbagged Fresh Start by disclosing hundreds of
6 pages of medical records the day after Jack Welch's deposition. These documents
7 include significant new information concerning Plaintiffs' claims. For instance,
8 Jack Welch claims to suffer from tremors caused by Fresh Start's treatment
9 program. But the new records, from newly disclosed medical providers, include an
10 MRI taken less than two months after Jack left Fresh Start's program. This MRI
11 reveals *no injuries*. (Forman Decl. at Ex. G at 1, JWELCH-GULFCOAST-
12 MEDICAL-000001.) Likewise, the medical records reveal that Jack Welch suffered
13 neck spasms in February 2011, several years before he enrolled in Fresh Start's
14 treatment program, and before Jack now alleges he first developed tremors. (*Id.* at
15 7, JWELCH-CLEARLAKE-MEDICAL-000079.)

16 Most distressingly, many of these documents were evidently obtained weeks
17 or months before Welch's deposition. In other words, Plaintiffs had the documents,
18 but concealed them until after Fresh Start would no longer be able to ask questions
19 about them.

20 Numerous courts, throughout both this District and Circuit, have found that
21 tardy disclosures may provide grounds for reopening a deposition. As Judge Jones
22 found in 2011, when recently produced documents "should have been disclosed . . .
23 prior to . . . deposition so that [defendant's] counsel could have examined [the
24 deponent] about them," the defendant was "entitled, if it wishe[d], to reopen [that]
25 deposition." *JS Products, Inc. v. Kabo Tool Co.*, No. 2:11-CV-01856-RCJ, 2014
26 WL 2919184, at *4 (D. Nev. June 26, 2014). Reopening a deposition is an
27 especially appropriate remedy where, as here, the adverse party had sufficient time
28 to disclose its documents in advance of the deposition. *Syncora Guarantee Inc. v.*

1 *EMC Mortgage Corp.*, No. MC 13-80037 SI, 2013 WL 1208936, at *2 (N.D. Cal.
2 Mar. 25, 2013) (finding good cause to reopen a deposition where the plaintiff “*did*
3 *not* choose to depose [the witness] relatively early in discovery”) (emphasis added).

4 Jack Welch’s deposition occurred almost seven months after initial
5 disclosures were exchanged. He had had more than enough time to identify his
6 medical providers and produce his medical records. His counsel had the documents
7 at issue up to several months before they were produced. “[T]he fact of the matter”
8 is that Fresh Start “did not have the opportunity to question” Jack Welch about the
9 February 13, 2015, disclosures “solely due to [Plaintiffs’] failure to produce them.”
10 *All Star Seed v. Nationwide Agribusiness Ins. Co.*, No. 12CV146-L BLM, 2013 WL
11 1882260, at *7 (S.D. Cal. May 3, 2013). Since many of the medical providers who
12 provided these new documents had not previously been disclosed, the additional
13 disclosures “could not have [been] obtained from another source . . . provid[ing] the
14 requisite good need for re-deposing the witness[.]” *Id.*

15 3. Conclusion

16 Fresh Start’s request is simple. Plaintiff Jack Welch’s deposition should be
17 reopened. Welch should be required to answer all questions concerning [REDACTED]
18 [REDACTED], and Fresh Start should have the opportunity to ask him about his medical
19 records.

20 There is good cause to allow questioning as to both areas. Plaintiff
21 improperly refused to answer questions regarding the first issue, and dodged
22 questioning on the second issue by the simple expedient of withholding necessary
23 information until after the deposition had concluded. Since any additional
24 deposition would be limited to these two topics, preventing unnecessary duplication
25 of effort, good cause for reopening the deposition exists. *See Syncora Guarantee*
26 *Inc. v. EMC Mortgage Corp.*, 2013 WL 1208936, *2–3 (N.D.Cal. March 25, 2013)
27 (finding good cause to reopen the deposition of the witness where Plaintiff could
28 not have asked about documents that had not been produced at the time of the

1 deposition, Plaintiff did not choose to depose the witness relatively early in the
2 discovery process, and the additional deposition would be limited to discussing only
3 the new documents and not about the initial deposition).

4 **C. Request for Sanctions**

5 Plaintiffs should also be required to pay reasonable costs and attorney's fees
6 incurred both in (1) preparing this motion and (2) reopening and conducting Jack
7 Welch's deposition.

8 At the outset, costs and attorney's fees associated with filing a motion to
9 compel may be awarded under Rule 37(a)(5), which requires a party whose conduct
10 necessitated the motion to pay the movant's reasonable expenses in making the
11 motion, including attorney's fees, unless: "(1) the motion was filed without a good
12 faith effort to resolve the dispute without court action; (2) the party's objection was
13 substantially justified; or (3) other circumstances make an award of expenses
14 unjust." *Brincko*, 278 F.R.D. at 585 (citing Fed. R. Civ. P. 37(a)(5)). As described
15 above, Fresh Start has made a good faith effort to resolve the dispute without
16 seeking court intervention, asking Plaintiffs to stipulate to a reopened deposition.
17 Mr. Ham's "constitutionality" and "relevancy" objections were entirely without
18 merit. And Plaintiffs have offered no explanation for their withholding and late
19 production of relevant documents.

20 The court may also order "that the cost [of a reopened deposition] be borne by
21 the party whose counsel's conduct necessitated retaking the deposition." *Brincko v.*
22 *Rio Properties, Inc.*, 278 F.R.D. 576, 581 (D. Nev. 2011) (citing *O'Brien v. Amtrak*,
23 163 F.R.D. 232 236 (E.D.Pa.1995). Again, as described above, reopening the
24 deposition is necessary *solely* because of Plaintiffs' dilatory tactics and improper
25 refusal to answer relevant questions. Accordingly, Fresh Start asks that it be
26 awarded costs and fees associated with further deposition preparation.

27 **IV. CONCLUSION**

28 Fresh Start regrets having to raise this issue with the Court. Unfortunately,

1 Plaintiffs' refusal to see reason has compelled this course of action. Fresh Start
2 respectfully asks that Jack Welch's deposition be reopened, and that Plaintiffs be
3 required to bear the costs and fees associated with both this motion and the reopened
4 deposition.

5
6 Dated: June 3, 2015

SCHEPER KIM & HARRIS LLP

7
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of SCHEPER KIM & HARRIS LLP and that on this 3rd day of June, 2015, I did cause a true copy of the foregoing CERTIFICATE OF INTERESTED PARTIES to be served via the CM/ECF electronic system to all parties on the service list.

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By: /s/Melissa Vasquez
An Employee of SCHEPER KIM & HARRIS LLP